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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 875

FRED R. DICKSON, Warden of the California State Prison at San Quentin, California,
Petitioner,

vs.

CHARLES EARL BRUBAKER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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OPINIONS BELOW

The opinion of the Court of Appeals is as yet unreported and is appended to this petition as Appendix A. The order of the United States District Court is unreported and appended to this petition as Appendix B. The opinion of the Supreme Court of the State of California is reported in 53 C.2d 37 and appended to this petition as Appendix C.

JURISDICTION

On November 14, 1962, the United States Court of Appeals for the Ninth Circuit reversed an order of the United States District Court for the Northern District of California, Southern Division, dismissing Charles Earl Brubaker's petition for a writ of habeas corpus. On December 20, 1962, petition for rehearing was denied. Petitioner, appellee below, invokes the jurisdiction of this Court under title 28, U.S.C. section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the District Court in a federal habeas corpus proceeding by a state prisoner was required to consider allegations of fact outside the record of the state court proceedings in passing upon Brubaker's claim that the representation afforded him by counsel was constitutionally inadequate.

2. Whether the Court of Appeals erred in holding that—regardless of the rule in cases involving representation by private counsel—the federal courts must consider allegations of fact outside the trial record when the claim of inadequate representation is made by a prisoner who happens to have been represented by a public defender.

3. Whether the Court of Appeals erred in holding that the allegations of fact presented by Brubaker constituted a showing of inadequate representation in the light of the trial record.

STATEMENT OF THE CASE

A. Proceedings in the State and Federal Courts.

On August 18, 1958, Charles Earl Brubaker was charged by information filed in the Los Angeles County Superior Court with two counts of murder, in violation of section 187 of the California Penal Code (CT 1-2).[1] On August 25, 1958, the Public Defender was appointed as counsel for Brubaker (CT 3). On August 28, 1958, Brubaker entered a plea of not guilty, and the court appointed Dr. E. E. McNeil to examine him and report to the court concerning his mental status (CT 4). Trial commenced on December 15, 1958 (CT 11), and on December 18, 1958, the jury returned a verdict finding him guilty of both counts of murder in the first degree (CT 14).

Pursuant to section 190.1 of the California Penal Code, which provides for a separate hearing on the issue of penalty, trial on this issue began on December 22, 1958, and the jury decided that Brubaker should suffer the death penalty for both murders (CT 58, 62-63). Judgment was entered accordingly.

On automatic appeal to the Supreme Court of California, Brubaker was represented by the Public Defender who briefed the case and advanced assertions of error regarding the sufficiency of the evidence to support the verdicts, the giving and modification of certain instructions, and the admission of certain allegedly inflammatory photographs. On November

[1] "CT" refers to the Clerk's Transcript and "RT" refers to the Reporter's Transcript of the state court trial, which were lodged with the District Court.

10, 1959, the Supreme Court of California unanimously affirmed the judgment. *People v. Brubaker*, 53 Cal.2d 37, 346 P.2d 8 (1959). Petitions for habeas corpus were denied by the Marin County Superior Court and the Supreme Court of California, Mr. Justice Peters being of the opinion that the writ should issue. A petition for certiorari to the United States Supreme Court was denied, the order noting that Mr. Justice Douglas was of the opinion that the petition should be granted. *Brubaker v. Dickson*, 365 U.S. 824 (1961).

On May 8, 1961, eight days before Brubaker's scheduled execution date, his petition for habeas corpus was filed in the United States District Court for the Northern District of California, Southern Division. Although no order to show cause issued, a hearing was had, and after arguments by both sides, the Court denied the petition, denied a requested stay of execution, and granted a certificate of probable cause. On May 12, 1961, an identical petition for habeas corpus was filed in the United States Court of Appeals, for the Ninth Circuit, and after argument, the Court declined to entertain such application, Brubaker dismissed his appeal from the decision of the District Court, and the petition was transferred to the United States District Court "for the hearing and determination of said application." See Order dated May 12, 1961, in U.S.C. No. 17365. On June 30, 1961, after hearing arguments and examining the record of the state court proceedings, the District Court dismissed the petition and denied petitioner a

certificate of probable cause. This order was reversed by the Court of Appeals in its decision of November 14, 1962, and petition for rehearing was denied December 20, 1962.

B. Statement of the Facts.

The details of Brubaker's crimes are set out in the opinion of the Supreme Court of California in *People v. Brubaker*, a copy of which is appended to this petition (Appendix C). In sum, the evidence shows that Brubaker brutally strangled Mrs. Irene Morey and her nine year old son Craig on the evening of July 20, 1958. He has at no time denied being the perpetrator of these killings. The transcript of the state court trial, considered by the District Court on the petition for habeas corpus (see *Brown v. Allen*, 344 U.S. 443 (1953), disclosed that Brubaker was arrested by Los Angeles police officers on the evening of July 22, 1958 (RT 93-94). When first questioned about the murders, Brubaker admitted seeing the victims on the evening of Sunday, July 20, but insisted that both were alive when he left the Morey apartment (RT 96, 110). Brubaker, however, was arrested and spent that night at the Wilshire District Police Station; the next morning, he was taken to the Police Administration Building in downtown Los Angeles (RT 96, 111-112). Several hours later, he confessed to the two murders, and a signed statement was taken from him (RT 99-107). The following day, Brubaker repeated this confession, and a recording of it was made, which was played to the jury (RT 133-134, 135-163). In both of these confessions, Brubaker referred

to the fair treatment the police had accorded him since his arrest (RT 100, 163), and he stated that he was confessing in order to "get everything straight." (RT 136). According to Brubaker's version of the incident, on the evening of the 20th, he had dinner at the Morey apartment at Mrs. Morey's invitation. He and Mrs. Morey consumed several drinks, and after young Craig went to bed, Mrs. Morey agreed to an act of sexual intercourse. As Brubaker was beginning the act, young Craig walked into the room, surprising them. Brubaker panicked and, without premeditation or reflection, killed the little boy and his mother.

The physical evidence tells a different story. The investigating officers found that the back door of the Morey apartment appeared to have been forced open (RT 43-47, 78). Contrary to Brubaker's story of Mrs. Morey's willing submission, the officers found that her blouse had been torn open with enough force to pull off three of its five buttons (RT 121) and that the shorts she had been wearing were torn all the way to the crotch (RT 122-123). Five buttons of various sizes were found near Mrs. Morey's body (RT 123-127). While Brubaker stated in his confessions that he arrived at the Morey apartment at about 7:30 P.M. and did not leave until midnight or 12:30 A.M., and specifically denied returning to the apartment (RT 161-162), a newspaper was found in the apartment which had been printed no earlier than 10:00 P.M., on the evening in question (RT 84-82, 84-88). Moreover, a cocktail waitress who knew Brubaker testified that she saw him at her bar some time between 10:00

and midnight on the evening in question and that she saw him again at about 2:30 the next morning at a drive-in (RT 61-62).

At the trial, Brubaker was represented by an experienced member of the Los Angeles County Public Defender's office. No objection was made to the introduction of either confession (RT 102, 134). There was not the slightest suggestion that these confessions were anything but completely free and voluntary. As a matter of fact, in his argument to the jury during the guilt phase of appellant's trial, counsel, in discussing Brubaker's failure to testify in his own behalf (it should be noted that Brubaker personally informed the trial court that he did not wish to testify [RT 167]), stated that his client had chosen not to testify because the jury, in listening to the officers' account of his statement to them and the tape, had already heard all that Brubaker had to say about the crime (RT 198). He also told the jury that since the officers had apparently accepted Brubaker's version of the incident, so should they (RT 202).

On appeal, the Supreme Court of California affirmed the conviction, holding that the evidence was sufficient to support verdicts of first degree murder, both on the theory that the killings were premeditated and deliberate and also that they were committed in the course of an attempted rape; second, that certain instructions requested by the defense were properly refused and that the instructions which the trial court gave to the jury were correct; and, finally, that certain photographs which were admitted over defense

objections were properly received into evidence. In the course of its opinion, the court noted,

> "The record discloses that defendant freely and voluntarily, without promise of immunity or hope of reward, made the . . . confession to police officers after his arrest." *People v. Brubaker, supra* (Appendix C).

The allegations of Brubaker's petition to the District Court for a writ of habeas corpus are summarized in the opinion of the Court of Appeals (Appendix A). In brief, Brubaker alleged: (1) That there was evidence that, by reason of brain injury, he was incapable of entertaining the specific intent required for first degree murder at the time and under the circumstances of the homicides; (2) That his confessions were inadmissible because the officers denied his requests to see an attorney, because he was not advised of his right to remain silent, and because one of the officers threatened him. He also said that he had no clear recollection of the events in question and that details of the killings were suggested to him by the officers; (3) That he was denied effective assistance of counsel because the Public Defender failed to properly prepare and present his case. He claimed that counsel was inadequate because he only consulted with him for about an hour in the three months between accusation and trial, because he made no effort to elicit appellant's personal history, failed to arrange an independent psychiatric examination, failed to object to the confessions, failed to allow him to testify, and did not offer evidence in mitigation at the trial on the issue of penalty.

The District Court, after examining the petition, reading the record of the state court proceedings, and listening to lengthy arguments, denied the petition. Its order declares:

> "This Court, after having read and considered the petition on file, the return to the order to show cause issued by this Court on May 12, 1961, and the traverse to this return filed by petitioner, and after having read and considered in full the transcripts of the case of *People v. Brubaker*, Los Angeles Superior Court Criminal No. 6448, which were lodged with this Court, pursuant to *Brown v. Allen*, 344 U.S. 443, hereby makes the following order:
>
> "1. There is nothing in the record to sustain the petitioner's allegation that he was denied the effective aid of counsel due to the inadequacy of representation afforded to him by the Public Defender's office of the County of Los Angeles, and the actions of the Public Defender during the petitioner's trial did not constitute a violation of the 14th Amendment of the United States Constitution. The Court further finds, based on the transcripts of the trial filed with this Court, that the petitioner Brubaker did receive adequate representation by counsel, through the Public Defender of the County of Los Angeles, during the trial of the case of *People v. Brubaker*, Los Angeles Superior Court Criminal No. 6448.
>
> "2. The Court further finds, based on the transcripts on file with the Court and the evidence contained therein, that the confessions of the petitioner set out in those transcripts were freely and voluntarily made." (Appendix B).

The Court of Appeals reversed this order and remanded the cause for reasons which will be discussed in the following sections of this petition.

REASONS WHY CERTIORARI SHOULD BE GRANTED

1. The Court of Appeals Erred in Holding That the District Court Was Required to Consider Facts Outside the Record of the State Trial in Passing Upon Brubaker's Claim That the Representation Afforded Him by Counsel Was Constitutionally Inadequate.

The District Court determined the adequacy of Brubaker's representation by counsel after examining the record of the proceedings in the state court (App. B). This was in accord with those decisions which hold that no state action, and, therefore, no denial of due process is present unless the inadequacy of counsel is so apparent as to require intervention by either the prosecuting attorney or the trial court. *Petition of Ernst*, 294 F.2d 556 (3d Cir. 1961); *Darcy v. Handy*, 203 F.2d 407 (3d Cir. 1952). See also *People v. Davis*, 48 Cal.2d 241, 309 P.2d 1 (1957). Due process does not require errorless counsel. See *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960). It is only where the appearance of counsel amounts to no representation at all that a denial of fundamental rights is involved. See *Powell v. Alabama*, 287 U.S. 45 (1932). Indeed, the rule in California is similar. *People v. Wein*, 50 Cal. 2d 383, 326 P.2d 457 (1958); *People v. Davis*, 48 Cal. 2d 241, 309 P.2d 1 (1957); *In Re James*, 38 Cal.2d 302, 240 P.2d 596 (1952).

In view of the rules set out above, it was proper for the District Court in the exercise of its discretion (see *Brown v. Allen*, 344 U.S. 443 (1953)) to limit the scope of its inquiry to an examination of the record of the state proceedings. From the face of that record, the court could determine whether the representation afforded Brubaker was so inadequate as to require intervention by the trial court or the prosecuting attorney.

The Court of Appeals adopted a contrary rule:

> "We note at the outset that appellant's allegations of fact outside the trial record must be considered in determining whether the petition alleged a denial of appellant's constitutional right to the effective aid of counsel." (Appendix A).

In a footnote, the Court noted and rejected the established rules:

> "It has been suggested that limitation to the trial record is justified in federal habeas corpus proceedings involving state prisoners because the Fourteenth Amendment applies only to state action, and unless the inadequacy of representation was so obvious that the judge or prosecutor should have observed it and intervened, state action is lacking. The decisions cited in note 4 necessarily reject any such limited view of state responsibility for the fairness of the process by which the state deprives persons of life or liberty." (Fn. 3, Appendix A).

It then cites eight federal cases.

None of "the decisions cited in note 4" contain a square holding contrary to the ruling of the district

court. Thus, in *Luton v. Texas*, 303 F.2d 899 (5th Cir. 1962), it was held that where the District Court, in its discretion, had held a hearing upon the adequacy of the representation afforded that petitioner, it was error to exclude evidence bearing upon the credibility of the defense counsel. In *Turner v. Maryland*, 303 F.2d 507 (4th Cir. 1962), it was held that the District Court could not accept a determination by state courts that the representation afforded by counsel was adequate. *Turner* does not hold that the District Court may not make an independent determination of that question based upon an examination of the state court records. In *United States ex rel. Tillery, v. Cavell*, 294 F.2d 12 (3d Cir. 1961), the appointment of counsel was alleged to have occurred on the same day as the trial. State action is obviously present where a state court appoints counsel and fails to afford him adequate time to consult with defendant and prepare the case, and it might be noted that in *Tillery*, the Court of Appeals held that the District Court might properly resolve this issue by examining the state court records. *Lance v. Dowd*, 261 F.2d 351 (7th Cir. 1958), 244 F.2d 108 (7th Cir. 1957), holds that a district court may base a finding of inadequacy of counsel upon a state court's record and that in that particular case the record established such inadequacy that either the trial judge or the prosecution should have intervened. *Williams v. Moore*, 285 F.2d 590 (5th Cir. 1961), says nothing at all about the proper scope of review.

Only two of the cited cases even remotely support the conclusions reached by the Court of Appeals in

the present case. In *Snider v. Cunningham*, 292 F.2d 683 (4th Cir. 1961), 263 F.2d 372 (4th Cir. 1959), it was held that the District Court should hold a hearing to explore a defendant's mental condition even though his mental state was not an issue at the state trial. In *MacKenna v. Ellis*, 280 F.2d 592 (1960), modified 289 F.2d 928 (5th Cir. 1961), it was held over vigorous dissent a denial of due process to appoint inexperienced lawyers to represent the defendant when those lawyers had also applied for employment with the district attorney's office.

Contrary to the statement of the Court of Appeals that when inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record, we respectfully submit that since the substantive rule requires that it be shown that state officers were or should have been aware of the inadequacy of counsel and should have taken steps to correct the situation, the procedure to determine whether the substantive rule has been complied with requires no more than an examination of the proceedings in which state officers were present and could have acted, that is, the proceedings at the trial reflected in the record.

2. The Court of Appeals Erred in Holding That—Regardless of the Rule in Cases Involving Representation by Private Counsel—the Federal Courts Must Consider Allegations of Fact Outside the Trial Record When the Claim of Inadequate Representation Is Made by a Prisoner Who Happens to Have Been Represented by a Public Defender.

In concluding footnote 3, part of which is quoted above, the Court of Appeals states, "In any event, in

the present case trial counsel was an employee of the state" (Appendix A). In the language appearing immediately before this sentence in footnote 3, the Court of Appeals had rejected the determination of the District Court that it was limited to a review of the record of the state trial. The sentence in question implies that since Brubaker was represented at trial by a member of the Public Defender's Office, a different rule than that ordinarily applied in federal habeas corpus proceedings is applicable.

Brubaker happened to be tried in Los Angeles County, and being without funds was represented by a member of the Office of the Public Defender in that county. The quality of representation afforded by that office has been praised by state and federal courts. *People v. Hughes*, 57 Cal.2d 89, 17 Cal.Rptr. 617, 367 P.2d 33 (1962); *People v. Adamson*, 34 Cal.2d 320, 210 P.2d 13 (1949); *Collins v. Heinze*, 125 F. Supp. 186 (N.D. Calif. N.D. 1954).

Brubaker might have been represented by counsel of his own choosing. Had he been tried in some counties in California, he might have been represented by an attorney engaged in private practice, but appointed by the trial court to represent him and compensated out of public funds. He might have been represented by private counsel serving voluntarily without compensation.

The Court of Appeals has stated that in one class of case—when a defendant is represented by a public defender who specializes in the defense of criminal actions and is for some purposes a public employee—

it will apply a different scope of review of adequate representation within the meaning of the due process clause than in all other classes of cases. This conclusion flies squarely in the face of California law and has no support in logic.

It is a state function to define the respective rights, duties, and obligations between the attorney and his client, and indeed, the State of California has done so. Cal. Bus. & Prof. Code, §§ 6000-6154. If the State of California, in setting up the office of Public Defender, chooses to invest that officer with as much freedom and as wide a latitude as any private attorney would have in defending a party accused of crime, the federal courts should respect that decision. This is precisely what California has done. In the leading case of *In re Hough*, 24 Cal.2d 522 at 528-529, 150 P.2d 448 at 451-452 (1944), the Supreme Court of California carefully explained that the public defender is in the same position as privately retained counsel:

> "The office of public defender was created by an act of the Legislature enacted in 1921. (See Stats. 1921, p. 354, ch. 245, Deering's Gen. Laws, 1937, Act 1910.) By section 5 of this act the duties of such an officer are defined in the following terms, so far as pertinent to this proceeding: 'Upon request of the defendant or upon order of the court, the public defender shall defend, without expense to them, all persons who are not financially able to employ counsel and who are charged with the commission of any contempt, misdemeanor, felony or other offense. He shall also, upon request, give counsel and advice to such

persons, in and about any charge against them upon which he is conducting the defense, and he shall prosecute all appeals to a higher court or courts, of any person who has been convicted upon any such charge, where, in his opinion, such appeal will, or might reasonably be expected to, result in the reversal or modification of the judgment of conviction.' While the act has been amended on two occasions (Stats. 1927, p. 1886; Stats. 1931, p. 2566) the quoted portion of section 5 has not been changed in any respect. Section 6 of the act, both in its original and amended form, provides for the appointment by the board of supervisors of a sufficient number of deputies to conduct the office of public defender properly and fixes their salaries.

"Under this statute when the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before his court. The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents. Were it not so his client would not be afforded the full right 'to have assistance of counsel for his defense' which the Constitutions, both state and federal, give to one accused of crime. With such plenary powers given a public defender when appointed to defend one

> accused of crime, it necessarily follows that no act of his in advising his client or in defending the latter upon the charge against him can be considered in any different light than if such act were performed by an attorney regularly employed and retained by the defendant. In no sense can it be held that the prosecuting officers of the county are in any respect charged with the consequences of such an act. The contention therefore that the petitioner is not bound by his pleas of guilty, on the ground that in so pleading he was misled by the advice of the public defender acting as his attorney, is not well taken." See also *In Re Mehley*, 48 Cal.2d 408, 310 P.2d 15 (1957).

Therefore, in the light of the specific declaration by the courts of California defining the relationship of the public defender and his client, to characterize his action as state action merely because he happens to be paid out of the County Treasury is an unrealistic formalism.

No good reason commends itself to us, nor does the Court of Appeals suggest one, to justify a different rule for public defender cases than for cases involving privately retained counsel. Moreover, the decision imposes a dual responsibility upon the public defender —for purposes of federal habeas corpus proceedings —which is contrary to, and inconsistent with state law.

3. The Court of Appeals Erred in Holding That the Allegations of Fact Presented by Brubaker Constituted a Showing of Inadequate Representation in the Light of the State Trial Record.

The opinion of the Court of Appeals, in holding that the District Court was required to consider Brubaker's allegations of fact outside the state court records in determining whether he was afforded adequate representation of counsel, assumes that had the scope of inquiry been limited to the face of the state court records, there would be no question that the representation afforded Brubaker was anything other than adequate. Assuming, however, that the District Court was required to consider Brubaker's allegations of fact outside the record, it is our contention that these allegations were refuted by the record, thus justifying denial of the petition.

The main thrust of Brubaker's application to the District Court was that by reason of certain alleged brain damage, he was incapable of maintaining the specific intent required for first degree murder and that the Public Defender entirely failed to investigate and present this defense. Of course, failure of counsel to present a contention, even if it be negligent failure, does not deprive a defendant of due process. *Weber v. Regen*, 176 F.2d 579, 7th Cir. (1949); *Farrell v. Lanagan*, 166 F.2d 847, 1st Cir. (1948); *Tompsett v. Ohio*, 146 F.2d 95, 6th Cir. (1944). Moreover, the Court of Appeals may have overlooked what the District Court apparently recognized, i.e., the long standing California rule that specific intent is not required to sustain a conviction of first degree murder when the

homicide is committed in the course of an attempted rape. See *People v. Cheary*, 48 Cal.2d 301, 313, 309 P.2d 431, 437 (1957); *People v. Rupp*, 41 Cal.2d 371, 378, 381, 260 P.2d 1, 5, 6 (1953). Even though this evidence may have had some bearing on the issue of Brubaker's ability to premeditate and deliberate, it would not have been of assistance to the defense in refuting the second aspect of the prosecution's case, namely, that the murders were in the course of an attempted rape.

Actually, the so-called personal history of the defendant and the psychological evaluation thereof which Brubaker presented to the District Court amount to no more than that when Brubaker drank too much, he was a troublemaker, which is true of a good many people. The Public Defender could well have realized that had Brubaker testified that he had no recollection of the incidents in question (this is apparently Brubaker's position now), he would have been subject to the most grueling kind of cross-examination based on his detailed confession to the arresting officers and also his interview with the court appointed psychiatrist, who was able to report, "He was aware of the nature of his alleged crimes and was able to talk about the incidents of and surrounding the crimes in detail." (CT 9)

The Court of Appeals also declares that the Public Defender's failure to secure an independent psychiatric examination of Brubaker, even though funds were allegedly available for this purpose, is a further example of his inadequate representation. There is

no allegation in the petition, however, that the court appointed psychiatrist was not, in fact, independent.

Present counsel also complains of the Public Defender's failure to call Brubaker as a witness, of his failure to object to the admission of the confessions into evidence, and of his failure to offer evidence in mitigation at the trial on the issue of penalty. But Brubaker, himself, stated in open court that he did not wish to testify (RT 187). As to the failure to object to the confessions, all the evidence in the trial record compels the conclusion that these were free and voluntary. One of the interrogating officers testified that the confessions were freely and voluntarily given (RT 94), and defendant himself, in the course of the interrogation, admitted that his statements were free and voluntary (RT 106-107).

Actually, it is not difficult to understand why defense counsel failed to object to these confessions. He informed the court that he had listened to the tape-recording (RT 134), and the written confession was admitted in evidence only after defense counsel had reviewed it and eliminated certain objectionable matter. (See RT 88, 89.) While the physical evidence suggests that Brubaker forced his way into the Morey apartment late in the evening and tore open Mrs. Morey's clothing, Brubaker's confession, on the other hand, appears to have been calculated to convince his listeners that he was in the Morey apartment by invitation, that Mrs. Morey willingly agreed to participate in an act of sexual intercourse, thus negativing an attempted rape, and that the killings were done be-

cause of surprise and panic, thus negativing premeditation and deliberation." Even if we assume that Brubaker had a right to be assisted by counsel during the police interrogation and a right to object to the admission of the confessions into evidence if such assistance was not afforded him, this right can be waived. See *Ogler v. Boles*, 368 U.S. 448, 454 (1962). Brubaker, acting through counsel, waived these rights because it was felt on balance these confessions would be helpful to his case. Present counsel and the Court of Appeals may disagree with this tactic, but, as was stated in *Weber v. Rogen, supra*, 176 F.2d at 586, "are we to second guess a competent lawyer into incompetency?"

While the Public Defender did not introduce any evidence at the penalty phase of the trial, we must point out that the evidence which present counsel and the Court of Appeals feel should have been offered in mitigation is not at all compelling, if even relevant. For example, what relevance does a history of seizures and blackouts have in a case where the defendant has confessed the crimes in detail, not only to the arresting officers, but also to an independent psychiatrist appointed by the court? See *People v. Rupp, supra*. Defendant was clearly aware of what he was doing at the time he committed the offenses, and this is established by the record. Moreover, as a veteran of numerous criminal trials in Los Angeles County, the Public Defender was in a much better position to assess the potential effect of evidence on a criminal jury than those of us who must evaluate this case on a cold record.

CONCLUSION

In this case, the Public Defender was charged with the duty of representing a man who had committed two brutal homicides under the most heinous of circumstances and who had freely and voluntarily confessed to them in explicit detail shortly after his arrest. Counsel tried to convince the jury to accept Brubaker's version of the incident. That he failed to do so does not mean that he could not have succeeded. Present counsel and the Ninth Circuit disagree with the way in which the Public Defender handled his case. Perhaps hindsight is clearer than foresight, but, in any event, the actions of the Public Defender should be judged by the same standard applied to private counsel, and no broader scope of review should be required on the petition for a writ of habeas corpus for a defendant who happens to have been represented by a public defender.

We most respectfully ask this Court to grant certiorari.

Dated, February 8, 1963.

STANLEY MOSK,
Attorney General of the State of California,
ROBERT R. GRANUCCI,
Deputy Attorney General,
Attorneys for Petitioner.

ALBERT W. HARRIS, JR.,
Deputy Attorney General,
Of Counsel.

(Appendices A, B and C Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Charles Earl Brubaker, Appellant, vs. Fred R. Dickson, Warden of the California State Prison at San Quentin, California, Appellee.	No. 17,583 Nov. 14, 1962

On Appeal from the United States District Court
for the Northern District of California
Southern Division

Before BARNES, JERTBERG and BROWNING,
Circuit Judges

BROWNING, Circuit Judge:

Appellant was convicted in the Superior Court of Los Angeles County of murder in the first degree. He was sentenced to death. After exhausting state remedies,[1] appellant filed a petition for habeas corpus in

[1]The conviction was affirmed by the Supreme Court of California on direct appeal. People v. Brubaker, 53 Cal.2d 37, 346 P.2d 8 (1959). Appellant filed petitions for habeas corpus in the Marin County Superior Court and in the Supreme Court of California. They were denied without hearing. The order of the Supreme Court of California noted that Mr. Justice Peters was of

the District Court. That court denied the petition after oral argument. Appellant then filed an identical petition in this Court. We declined to entertain it, transferring the application back to the District Court for "hearing and determination."[2] The District Court again dismissed the petition on oral argument, rejecting affidavits offered by both sides and declining to receive further evidence.

I.

Appellant alleged that he had been denied effective aid of counsel at his trial in the state court. He alleged that through lack of investigation and preparation his court-appointed trial counsel failed to discover and present substantial defenses which appellant had to the charge against him. These defenses were said to be (1) that at the time of the homicides appellant could not have had the specific intent required for first-degree murder; and (2) that certain confessions, which were the sole evidence of appellant's guilt, were obtained in violation of his constitutional rights. He further alleged that trial counsel inexcusably failed to discover and present evidence in mitigation of sentence, although substantial evidence was available.

In the court below, the State took the position that the petition for habeas corpus "should be decided

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the opinion that respondent should be ordered to show cause. A petition for certiorari to the Supreme Court of the United States was denied, the order noting that Mr. Justice Douglas was of the opinion that certiorari should be granted. Brubaker v. Dickson, 365 U.S. 824 (1961).

[2] 28 U.S.C.A. § 2241 (b).

upon the basis of the Court's evaluation of the petitioner's allegations in the light of [the] record of the state court proceedings on file with this court." The District Court adopted this view, and declined to receive additional evidence. The court entered an order stating that it had examined the petition, the return, the traverse, and the transcripts of the state court proceedings, and that there was "nothing in the record" to sustain appellant's allegation that he had been denied effective aid of counsel.

We note at the outset that appellant's allegations of fact outside the trial record must be considered in determining whether the petition alleged a denial of appellant's constitutional right to the effective aid of counsel.[3] A contrary rule would fall short of protecting this right. When inadequate representation is alleged, the critical factual inquiry ordinarily relates

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[3]See Palmer v. Ashe, 342 U.S. 134, 137-38 (1951); Hawk v. Olson, 326 U.S. 271, 274-78 (1945); Jones v. Huff, 152 F.2d 14, 16 (D.C.Cir. 1945). The adequacy of representation is properly tested by an examination limited to the trial record only when the question is presented on direct appeal. See generally 47 Colum.L.Rev. 115, 120-22 (1947). It has been suggested that limitation to the trial record is justified in federal habeas corpus proceedings involving state prisoners because the Fourteenth Amendment applies only to state action, and unless the inadequacy of representation was so obvious that the judge or prosecutor should have observed it and intervened, state action is lacking. The decisions cited in note 4 necessarily reject any such limited view of state responsibility for the fairness of the process by which the state deprives persons of life or liberty. In any event, in the present case trial counsel was an employee of the State. See Cal. Gov't Code §§ 27700-27711; 13 Stan.L.Rev. 522 (1961). See also Hawk v. Olson, 326 U.S. 271 (1945). "[T]he defender is a public official with the dignity of the state behind him." 45 Minn.L.Rev. 715, 721 (1961).

to matters outside the trial record: whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choices of trial tactics and strategy.[4] If the petition, including appellant's allegations of fact outside the trial record, presents grounds which would entitle appellant to relief, he should be afforded an opportunity to support his allegations by proof.[5] With this in mind, we turn to the detailed allegations of the petition.

A. The factual allegations in support of a defense based upon appellant's mental state when the crime was committed may be summarized as follows:

Electroencephalographic (EEG) examinations made subsequent to appellant's conviction revealed organic

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[4]See, e.g., Luton v. Texas, 303 F.2d 899 (5th Cir. 1962) (holding that it was error to exclude evidence bearing upon the credibility of trial counsel as a witness called to explain his conduct of the defense); Turner v. Maryland, 303 F.2d 507 (4th Cir. 1962); United States ex rel. Tillery v. Cavell, 294 F.2d 12, 21-22 (3d Cir. 1961); Snider v. Cunningham, 292 F.2d 683 (4th Cir. 1961), 263 F.2d 372 (4th Cir. 1959), Williams v. Moore, 285 F.2d 590 (5th Cir. 1961); MacKenna v. Ellis, 280 F.2d 592 (1960), modified 289 F.2d 928 (5th Cir. 1961); Lunce v. Dowd, 261 F.2d 351, 353 (7th Cir. 1958), 244 F.2d 108 (7th Cir. 1957).

[5]Linden v. Dickson, 287 F.2d 55, 57-58 (9th Cir. 1961). There is no question here of deferring to a state court determination of the facts, since the state courts have not chosen to determine them; and neither we nor the District Court may defer to the state courts' resolution of the underlying issue of constitutional law. Irvin v. Dowd, 366 U.S. 717, 723 (1961); Brown v. Allen, 344 U.S. 443, 506, 507-08 (1953).

brain damage.[6] His prior medical history contained episodes of head injury and infantile illness from which the brain damage could have resulted;[7] there were no such incidents subsequent to the homicides. Medical opinion indicated that the damage was such as to render appellant "definitely seizure prone";[8] and was "of a type often associated with abnormal and otherwise unexplainable conduct."[9] There was psychiatric opinion based upon post-conviction evaluations that appellant, while not "insane," had a compulsive personality marked by strong emotional instability.[10] There was substantial evidence of hyper-

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[6]The examinations were conducted by doctors at San Quentin Prison. A report of examination by that institution's Neuropsychiatric Committee stated, "His EEG shows abnormal tracings with localizing in the right temporal parietal area, where he has a scar from an old head injury in 1942, when he claims he was unconscious for 36 hours."

[7]See note 6. The affidavit of appellant's mother confirmed both incidents. Affidavits of Dr. John J. Preisinger, Diplomate, American Board of Psychiatry and Neurology, supported the possible causal connection.

[8]Dr. Yeager, Langley Porter Clinic, following latter's examination of appellant's EEG's, as quoted in the affidavit of one of appellant's present attorneys.

[9]In reprieve granted May 15, 1960, by the Governor of California, as quoted in affidavit of one of appellant's present attorneys: "[E]lectroencephalographic [EEG] testing conducted by the Chief Psychiatrist at San Quentin [shows] that Brubaker has some organic brain damage of a type often associated with abnormal and otherwise unexplainable conduct."

[10]The report of the San Quentin Prison Neuropsychiatric Committee stated, "We are agreed that his personality structure may best be described as a Passive-Aggressive Personality with Emotional Instability, Neurotic and Dissociative Features with Overcompensatory Aggressive behavior." A psychological evaluation of appellant prepared by a San Quentin Prison clinical psychologist noted indications of "emotional lability and compulsive tendencies," and stated that under the stimulus of alcohol "he has a definite tendency to act-out in an hysterical, impulsive manner."

sensitivity to alcohol:[11] and the record established that immediately prior to the homicides appellant had drunk heavily.[12] There was competent medical opinion to support the view that, in the light of these and other factors, appellant was incapable of entertaining the specific intent required for first-degree murder at the time and in the circumstances of the homicides.[13]

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[11] Affidavits of two of appellant's work supervisors over a five-year period, and of his landlady, his mother, and his wife, related incidents involving violence and loss of memory following consumption by appellant of relatively minor quantities of alcoholic beverages.

[12] The confessions recited the consumption by appellant of a can of beer, two drinks of vodka, and close to an additional one-half pint of vodka, immediately before the homicides. The autopsy physician testified at trial that the alcohol blood content of the female victim, whom appellant matched "drink for drink," was above the level indicating intoxication. Also, appellant's affidavit stated that he had consumed additional substantial quantities of alcohol during the preceding twenty-four hours.

[13] The affidavit of Dr. John J. Preisinger stated that even before the electroencephalogram was available "there was little doubt in my mind that Mr. Brubaker had organic brain disease which would affect his behavior while drinking," and concluded, "I do not see how he could form any intent to do wrong (with even vague responsibility) if he were drinking." The affidavit of one of appellant's present attorneys stated that he submitted the same documentary material that Dr. Preisinger had seen to Dr. Edward T. Colbert, of Santa Monica, California, and that Dr. Colbert "substantially corroborates the opinion of Dr. Preisinger," and was further of the opinion that at the time of the homicides "retreat was impossible for a person of petitioner's compulsive and unstable psychic makeup."

The affidavit of Dr. Bernard L. Diamond, member of the American Psychiatric Association and author in forensic psychiatry, expressed the view that existing data indicated the desirability of further examination of appellant to determine his mental state at the time of the homicides. Dr. A. A. Marinacci, head of the Departments of Electroencephalography, Los Angeles County General Hospital, University of Southern California, and Good Samaritan Hospital, Los Angeles, agreed to examine appellant's electroencephalograms. Appellant's present attorney sought but was denied the opportunity to arrange for such examinations.

B. The following factual allegations were made in support of the inadmissibility of the confessions.

Appellant was arrested on a Tuesday evening. He was taken to the police station and booked. He told the arresting officers he wished to contact an attorney; they said he could get his attorney "later." He repeated this request twice more in the course of the evening. The requests were denied. The following morning he again asked to see his attorney; the officers said, "You'll see him."[14]

Appellant was questioned briefly the evening of his arrest. The following day he was subjected to lie detector tests and questioned intermittently from about 9:00 a. m. until about 2:30 in the afternoon when he first confessed. This confession, much longer than those subsequently taken, was recorded, but was later destroyed and was not introduced at trial. After further questioning, a typewritten statement was prepared which appellant signed and which was introduced at trial. The questioning resumed the following day. A tape-recorded confession taken that afternoon was also introduced at trial.

At the time of his arrest appellant was employed as a service station attendant. He had a tenth grade education, having failed the eleventh grade. He was thirty-nine years old. As noted, his personality was

[14] A memorandum prepared by a Deputy Public Defender following an interview with appellant shortly after his arraignment contained the notation, "Says denied atty at 1st." Affidavits of the two arresting officers "lodged" with the District Court but not accepted for filing, acknowledged a conversation with appellant regarding an attorney, although denying that he requested permission to telephone counsel.

characterized by "emotional instability" and "neurotic and dissociative features."[15] He did not know of his right to remain silent when questioned by the police. The officers did not advise him of his right; he was told that his interest lay in telling them his story fully and accurately before trial.[16]

From the final refusal of his request to contact a lawyer, appellant inferred that he would not be permitted to see a lawyer until he confessed. Before he confessed, one of the officers told him they had "other ways" to make him talk, which appellant took as a threat of violence. Appellant states that he confessed in fear, and in ignorance of his rights; that he had no clear recollection of the critical events surrounding the commission of the crime, and that the details which appear in the recorded confessions were suggested to him by the officers as the way things must have happened.[17]

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[15]See note 10.

[16]Nothing in the confessions or elsewhere in the record indicates that appellant knew or was advised of his constitutional rights. The following excerpts from the tape-recorded confession reflect the substance of the advice given appellant by the officers: "It's much better for you if you are going to find you told something wrong to tell us now than it is to wait until we get in court, and meanwhile have us find out, and possibly get proof that something you told us was not right. . . . If you can think of anything important to this case, tell us about it now. Because we don't want to go to court and prove you a liar. . . . If there's anything that you can straighten out now, you straighten it out in your story, and we won't have to go to court later and prove that this happened and you didn't tell us about it."

[17]The affidavit of a plant superintendent under whom appellant had worked was offered to support appellant's tendency to amnesia while intoxicated, followed by invention of details lost to memory. The affidavit of Dr. John J. Preisinger stated, "This phenomenon of confabulation is frequently found in patients who are alcoholics or who suffer brain damage."

C. The factual allegations in support of the contention that trial counsel failed to investigate and present appellant's defenses were as follows.

Appellant's trial counsel, a Deputy Public Defender, was appointed shortly after arraignment. Appellant told trial counsel that he knew nothing of the law, and placed himself entirely in trial counsel's hands.[18] Trial counsel initially recommended to appellant that he plead guilty. In the three-and-a-half months between arraignment and trial, trial counsel saw appellant on three occasions for a total of about an hour. Two of the conferences were devoted largely to matters other than appellant's defense.[19]

Trial counsel was aware of appellant's history of head injury and extended unconsciousness and of the heavy drinking that occurred on the night of the homicide.[20] Nonetheless, he made no effort to elicit

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[18]In an affidavit lodged with the District Court but not received for filing, trial counsel stated that appellant "placed his trust completely in me—more than once he said to me, 'I don't know anything about the law. I'll do whatever you say.'" The affidavit continued, "I never had any occasion to talk with Mr. Brubaker about what his rights might be and how he could exercise them if he was not satisfied with my representation of him. The occasion never arose for me to talk with Mr. Brubaker along these lines because he was so thoroughly cooperative."

[19]It is alleged that the first conference concerned the necessity of seeking a continuance because of counsel's commitments on other cases, and that the second was devoted largely to explaining to appellant and his mother that counsel was abandoning a defense of insanity because of the report of the court-appointed psychiatrist (see note 20), and that they should be prepared for the death penalty. The affidavit of appellant's mother confirmed the latter conversation in part.

[20]Appellant was examined by a court-appointed psychiatrist prior to the appointment of trial counsel. The letter report of this psychiatrist to the court found no evidence of mental illness, but

appellant's personal history, made no inquiries of appellant's family, friends or employers (although furnished the names by appellant),[21] and failed to arrange a private examination of appellant by an independent psychiatrist (although funds were available for that purpose), because he mistakenly supposed that the communications would not be privileged.[22] Trial counsel was told of the circumstances surrounding the taking of the confessions, including the refusal of appellant's prior requests for access to counsel,[23] but he did not pursue the matter.[24] Trial counsel did not exercise his right to obtain a copy of the initial recorded interrogation of appellant by the police, since destroyed, although it contained material of value to the defense.[25]

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recited appellant's history of head injury and extended unconsciousness, and a statement by appellant that his recollection of the crucial events was in "some parts . . . clouded up." (Letter from Dr. McNiel to Judge Nye, Oct. 2, 1958.) Trial counsel's affidavit and the trial transcript indicated that he was aware of the contents of the confessions later introduced at trial which recited in detail the drinking that occurred immediately prior to the homicides.

[21]Supported in part by affidavit of one of appellant's present counsel that certain witnesses interviewed by him stated specifically that they were not contacted by trial counsel.

[22]The affidavit of one of appellant's present counsel recited conversation with trial counsel to this effect. Present counsel cite In re Ochse, 38 Cal.2d 230, 238 P.2d 561 (1951), as establishing that under California law such communications are within the attorney-client privilege and as such are protected from disclosure.

[23]See note 14.

[24]Trial counsel's affidavit states, "I probably told [appellant] . . . that I thought it would be a futile act to object to the introduction of the confessions into evidence."

[25]Present counsel argue that this initial recording, concededly much more extensive than the later confessions introduced in trial, would have supported appellant's assertions that he was encour-

The only evidence offered at trial to prove appellant's commission of the homicides was appellant's two confessions, but trial counsel made no effort to exclude them, announcing "no objections" to the admission of the first, and stipulating to the admission of the second. When the State rested, appellant's trial counsel approached the bench with appellant, stating that he did not intend to put appellant on the stand and "would like an expression of consent or lack of consent for the record at this time." Appellant consented. Trial counsel then rested for the defense, calling no witnesses as to appellant's mental condition or any other matter. Trial counsel did not consult with appellant during the trial or between court sessions.[26]

Trial counsel argued in summation that appellant lacked the necessary intent for first-degree murder, relying entirely upon the immediate details of the crime as indicated in the confessions, and by the physical circumstances. None of the facts and contentions summarized above relating to the admissibility of the confessions and the bearing of appellant's mental condition and intoxication upon the issue of specific intent was presented to the court or jury either through cross-examination, by affirmative evidence, or in argument.

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aged in the mistaken belief that he had no right to remain silent and his interest lay in full pretrial disclosure, that he was threatened, and that the details in the later confessions originated with the officers and were suggested to appellant, and would also have reflected appellant's confusion and remorse.

[26]The trial continued over portions of three days.

The separate hearing on penalty required by California law[27] was scheduled to be held four days following appellant's conviction. The California statute provides that "Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty."[28] Appellant's trial counsel had assumed from the outset that a first-degree conviction was probable,[29] yet he made no preparation for the penalty hearing. He did not see appellant during the four days between verdict and hearing. As the hearing was about to convene he spoke with appellant for five minutes, telling him that he "ought not to be disappointed" if he received a death sentence.

The State offered evidence in aggravation of the penalty.[30] Appellant's trial counsel offered none in mitigation. When the State rested, appellant's counsel approached the bench with appellant, stating, "I would like the record to show that I have advised the defendant that, in my opinion, we have no evidence

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[27]California statutes provide that every person guilty of murder in the first degree shall suffer death or life imprisonment, and that the choice shall be made by the trier of fact in a separate proceeding following the determination of guilt. Cal. Pen. Code §§ 190, 190.1.

[28]Cal. Pen. Code § 190.1.

[29]See note 19.

[30]Trial counsel said he did not know what evidence the State intended to offer, though the principal witness was a cousin of appellant's wife. The hearing was delayed to permit trial counsel to examine the State's exhibits reflecting appellant's prior record, which trial counsel said he had not seen.

which would be of assistance to him in mitigation, and for that reason, I have recommended that he not testify." Appellant was asked to state for the record that counsel had so advised him and that he did not wish to testify; he responded, "That's correct." Trial counsel then rested. Substantial affirmative evidence in mitigation could have been secured by reasonable diligence,[31] but none was introduced because, as trial counsel stated, he was not aware that any was available.

Trial counsel's summation challenging particulars of the State's argument in aggravation of sentence could only have prejudiced appellant. The prosecution argued that appellant was "a madman, a sex fiend"; trial counsel responded that "there is not one iota of evidence concerning this man's mental condition. . . . He is presumed to be sane." The prosecutor

[31] As evidence relevant to mitigation, appellant's present counsel pointed to material relating to appellant's organic brain damage; compulsive and unstable personality, and hypersensitivity to alcohol; his background and personal history; the deformities, illnesses and insecurities of his childhood, the absence from his record of any prior convictions of felony or of assaultive crimes, and the reputation which he bore among his work supervisors, fellow employees, friends and neighbors. Illustrative of supporting affidavits in the latter category was that of a plant superintendent under whom appellant worked continuously for four years: "Charlie Brubaker has been a very good friend of mine and has been out to my house many times . . . . He was a gentleman at all times and always thoughtful . . . To kill someone was just not like him . . . . He is a very fine boy. . . . He was very good as a worker—one of the fastest men I had. . . . I know . . . that when he drinks, he just goes out of his head just one can of beer and he doesn't even know his own name. . . . Charlie never hurt anybody he ever worked with. He was a friendly person who never intended any harm to anyone. He used to go around and take up a collection for anyone in our shop who was in trouble and his own two bucks would go into the hat first."

argued that appellant had shown no remorse; trial counsel responded that, although appellant had "concededly lied" when first questioned, he had then determined to tell the truth, though perhaps this decision was "self serving" and reached "only . . . because he thought it would help him," and the jury should consider the fact that he had cooperated.

II.

The test to be applied in determining the legal adequacy of the allegations of appellant's petition is readily stated: "The requirement of the Fourteenth Amendment is for a fair trial";[32] the due process clause "prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right."[33] Compliance with this standard required that appellant, charged with a capital offense, be represented at trial by counsel.[34]

But the constitutional requirement of representation at trial is one of substance, not of form. It could not be satisfied by a pro forma or token appearance.[35] Appellant was entitled to "effective aid in the preparation and trial of the case."[36]

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[32]Massey v. Moore, 348 U.S. 105, 108 (1954).

[33]Betts v. Brady, 316 U.S. 455, 473 (1942).

[34]Powell v. Alabama, 287 U.S. 45 (1932).

[35]Avery v. Alabama, 308 U.S. 444, 446 (1940). Holly v. Smyth, 280 F.2d 536, 542 (4th Cir. 1960), and cases cited.

[36]Powell v. Alabama, 287 U.S. 45, 71 (1932). See Reece v. Georgia, 350 U.S. 85, 90 (1955); Hawk v. Olson, 326 U.S. 271, 274 (1945); Turner v. Maryland, 303 F.2d 507, 511 (4th Cir. 1962). Cf. Mays v. United States, 216 F.2d 186 (10th Cir. 1954); Wheatley v. United States, 198 F.2d 325 (10th Cir. 1952).

This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right.[37] Due process does not require "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance."[38] Determining whether the demands of due process were met in such a case as this requires a decision as to whether "upon the whole course of the proceedings," and in all the attending circumstances, there was a denial of fundamental fairness;[39] it is inevitably a question of judgment and degree.

From the allegations of the petition, the defenses available but not presented by trial counsel appear to have been substantial.

Under California law "on the trial of the issues raised by a plea of not guilty to a charge of a crime which requires proof of a specific mental state, competent evidence that because of mental abnormality not amounting to legal insanity defendant did not possess the essential specific mental state is admissible." Such evidence "is received not as a 'complete defense'

[37]Michel v. Louisiana, 350 U.S. 91, 101 (1955); Lunce v. Dowd, 261 F.2d 351, 353-54 (7th Cir. 1958).

[38]MacKenna v. Ellis, 280 F.2d 592, 599 (1960), modified 289 F.2d 928 (5th Cir. 1961).

[39]Malinski v. New York, 324 U.S. 401, 416 (1945) (concurring opinion); Betts v. Brady, 316 U.S. 455, (1942). "What due process requires in one situation may not be required in another, and this, of course, because the least change of circumstances may provide or eliminate fundamental fairness." Crooker v. California, 357 U.S. 433, 441 n. 6 (1958).

negating capacity to commit any crime but as a 'partial defense' negating specific mental state essential to a particular crime.'"[40] Evidence as to appellant's mental state was also relevant to the question of penalty, and might well have been persuasive.[41]

The allegations of the petition made out a prima facie case for the excludability of appellant's confessions under the rule announced in *Crooker v. California*,[42] apart from whether appellant's "will was overborne."[43] As the court stated the rule in *Crooker*, "state refusal of a request to engage counsel violates due process . . . if [the accused] is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.' "[44] And as we held in *Griffith v. Rhay*, such prejudice is shown if from all the circumstances it appears that "it could not reasonably be inferred that [the accused] understood that he had the right to remain silent," that counsel "would probably . . . have advised [the accused] to refuse to talk," and that the statement given by the accused in the absence of advice of counsel was of a character clearly contrary to the accused's inter-

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[40]People v. Gorshen, 51 Cal.2d 716, 336 P.2d 492, 498-99 (1959), and authorities cited; People v. Wells, 33 Cal.2d 330, 202 P.2d 53, 61-70 (1949).

[41]This is also true of the evidence relating to appellant's background and personal history. See note 31.

[42]357 U.S. 433 (1958).

[43]See Spano v. New York, 360 U.S. 315 (1959). See also Rogers v. Richmond, 365 U.S. 534, 544 (1961).

[44]357 U.S. at 439.

ests.[45] The allegations of the present petition met this test.

Facts are alleged from which it would appear that these potential defenses would have suggested themselves to a reasonably diligent trial counsel. The defense actually tendered was so insubstantial in relation to those not offered as to cast doubt upon the hypothesis that trial counsel made a deliberate informed choice.[46] The failure of trial counsel to contact obvious witnesses lends further credence to the allegation that counsel did not undertake the investigation and research essential to adequate trial presentation. In any event, it would not seem proper to dispose of so substantial a showing "by resort to speculation and surmise"[47] as to possible explanations for trial counsel's inaction.

Upon an examination of the whole record, we conclude that appellant alleged a combination of circumstances, not refuted by the record, which, if true, precluded the presentation of his available defenses to the court and the jury through no fault of his own, and thus rendered his trial fundamentally unfair. Appellant does not complain that after investigation and

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[45] 282 F.2d 711, 717 (9th Cir. 1960).

[46] It is difficult to credit the suggestion, for example, that trial counsel deliberately chose to stipulate to the admission of confessions which were the sole evidence of appellant's guilt and which were at least arguably excludable under the rule announced in *Crooker*, on the theory that it would be better strategy to invoke the sympathy of the jury by a display of candor, especially since under California procedure the objection to the confessions could have been submitted initially to the court out of the presence of the jury.

[47] Palmer v. Ashe, 342 U.S. 134, 137 (1951).

research trial counsel made decisions of tactics and strategy injurious to appellant's cause; the allegation is rather that trial counsel failed to prepare, and that appellant's defense was withheld not through deliberate though faulty judgment, but in default of knowledge that reasonable inquiry would have produced, and hence in default of any judgment at all.[48] The omissions alleged by appellant "were not mere mistakes of counsel or errors in the course of the trial. If true, they constituted a total failure to present the cause of the accused in any fundamental respect. Such a proceeding would not constitute for the accused the fair trial contemplated by the due process clause. . . ."[49] It follows that appellant must have an opportunity to support the allegations of his petition, by proof, in a hearing before the District Court.[50]

It should be noted that none of the reasons which have sometimes prompted denial of a factual hearing on allegations of inadequate representation by counsel[51] are present in this case. The case with which

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[48]"Pro forma entry of an appearance without study or preparation for useful participation in the trial is not a satisfaction of the constitutional rights of an accused." Turner v. Maryland, 303 F.2d 507, 511 (4th Cir. 1962). The importance of reasonable investigation and preparation in determining whether challenged representation meets constitutional standards was emphasized by the court in Powell v. Alabama, 287 U.S. 45, 57-58 (1932). See also Jones v. Cunningham, 297 F.2d 851, 855 (4th Cir. 1962); MacKenna v. Ellis, 280 F.2d 592, 601-04 (5th Cir. 1960); Kyle v. United States, 263 F.2d 657 (9th Cir. 1959); Tucker v. United States, 235 F.2d 238 (9th Cir. 1956); Johnson v. United States, 110 F.2d 562 (D.C.Cir. 1940).

[49]Jones v. Huff, 152 F.2d 14, 15 (D.C.Cir. 1945).

[50]Linden v. Dickson, 287 F.2d 55, 57-58 (9th Cir. 1961).

[51]4 U.C.L.A. L.Rev. 400, 402-03 (1957); Fellman, The Defendant's Rights 124-25 (1958).

plausible but unfounded allegations may be made against trial counsel, the temptation of the convicted to blame their attorneys rather than themselves, and the weakness of the threat of perjury against those confined in prison or facing execution did not contribute to the allegations of this petition which was prepared and carefully documented by responsible counsel. The reputation of the Office of the Public Defender of Los Angeles County and of trial counsel in this case negated any possibility that available defenses were deliberately withheld to win delay and give accused two chances to prevail. The stresses imposed upon state-federal relations by differing determinations of the same factual issues[52] could not arise here, for no state court had considered the factual issues which the federal District Court will now determine for the first time on remand.

III.

Appellant's petition also asserted that appellant's conviction was constitutionally invalid solely because of the admission of the confessions, and independently of the infirmity arising from the lack of effective assistance of trial counsel.

As we have said, the allegations of the petition made a prima facie showing that the confessions were obtained in such circumstances that a conviction based upon them would violate due process. The State urges, however, that because appellant's trial counsel failed to object to the admission of the confessions at trial,

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[52]See generally 68 Yale L.J. 98, 101 (1958).

appellant may not raise this question in a habeas corpus proceeding.

An accused is normally bound in subsequent habeas corpus proceedings by the act of his counsel in waiving a constitutional right during trial,[53] but this is not invariably true.[54] The issue of whether the confessions were obtained in violation of appellant's constitutional rights, and, if so, whether appellant was bound by his trial counsel's consent to their admission, raises questions of fact and law inseparable from those involved in determining whether appellant was afforded effective aid of counsel. Since it is unlikely that on remand the former issue will be presented as an independent ground of decision, we believe it wise to withhold consideration of the problem at this time.

Remanded for further proceedings.

(Endorsed) Opinion Filed Nov. 14, 1962.

Frank H. Schmid, Clerk.

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[53]See United States ex rel. Reid v. Richmond, 295 F.2d 83 (2d Cir. 1961). See also Oyler v. Boles, 368 U.S. 448 (1962); Hamilton v. Alabama, 368 U.S. 52, 54 (1961); Whitley v. Steiner, 293 F.2d 895 (4th Cir. 1961).

[54]See, e.g., United States ex rel. Seals v. Wiman, 304 F.2d 53, 67-69 (5th Cir. 1962); United States ex rel. Noia v. Fay, 300 F.2d 345 (2d Cir.), cert. granted 369 U.S. 869 (1962), 62 Colum. L.Rev. 1077 (1962); United States ex rel. Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959). Cf. Massey v. Moore, 348 U.S. 105 (1954); Brown v. Allen, 344 U.S. 443, 503 (1953). See also Snider v. Cunningham, 292 F.2d 683 (4th Cir. 1961), 263 F.2d 372 (4th Cir. 1959).

For general discussion of the effect of "waiver" in state proceedings upon the availability of federal habeas corpus, see 7 Utah L.Rev. 423 (1961); 74 Harv.L.Rev. 1315 (1961); 61 Colum. L.Rev. 255 (1961).

Appendix B

United States District Court
for the Northern District of California
Southern Division

In the Matter of the Application of Charles Earl Brubaker For a Writ of Habeas Corpus.	No. 39920

ORDER DENYING PETITION FOR WRIT OF *HABEAS CORPUS* AND TERMINATING STAYS OF EXECUTION

The present application for the Writ of Habeas Corpus is before this Court after having been transferred hereto by the United States Court of Appeals for the Ninth Circuit, upon the order of that Court directing this Court to hold "hearing and determination of said application".

This Court, after having read and considered the petition on file, the return to the order to show cause issued by this Court on May 12, 1961, and the traverse to this return filed by petitioner, and after having read and considered in full the transcripts of the case of *People v. Brubaker*, Los Angeles Superior Criminal No. 6148, which were lodged with this Court, pursuant to *Brown v. Allen*, 344 U.S. 443, hereby makes the following order:

1. There is nothing in the record to sustain the petitioner's allegation that he was denied the effective aid of counsel due to the inadequacy of representation afforded to him by the Public Defender's office of the County of Los Angeles, and the actions of the Public Defender during the petitioner's trial did not constitute a violation of the 14th Amendment of the United States Constitution. The Court further finds, based on the transcripts of the trial filed with this Court, that the petitioner Brubaker did receive adequate representation by counsel, through the Public Defender of the County of Los Angeles, during the trial of the case of *People v. Brubaker*, Los Angeles Superior Court Criminal No. 6448.

2. The Court further finds, based on the transcripts on file with the Court and the evidence contained therein, that the confessions of the petitioner set out in those transcripts were freely and voluntarily made.

It Is Therefore Ordered that the Order to Show Cause previously issued by this Court in this case is discharged and the petition of Charles Earl Brubaker for the Writ of Habeas Corpus is denied. This order is final forthwith, and the stays of execution previously granted by both the United States Court of Appeals and the United States District Court in this case is terminated.

Dated: This 30th day of June, 1961.

George B. Harris
George B. Harris,
United States District Judge

United States District Court
for the Northern District of California
Southern Division

In the Matter of the Application of
Charles Earl Brubaker
For a Writ of Habeas Corpus.

No. 39920

ORDER DENYING CERTIFICATE OF PROBABLE CAUSE

Counsel for the petitioner, in his argument before the Court, having indicated that he desired to appeal the decision of the Court in this case denying the petition for writ of habeas corpus, the Court, for the convenience of counsel, considers the statements of counsel as an application for a certificate of probable cause, and having so treated the same, denies the certificate of probable cause requested by petitioner in this case.

Dated: This 30 day of June, 1961.

George B. Harris
George B. Harris
United States District Judge

Filed July 3, 1961
Clerk, U. S. District Court
San Francisco

Appendix C

(Vol. 53 Cal. 2d 37)

In the Supreme Court of the State of California

In Bank

Criminal No. 6448

The People of the State of California,
Plaintiff and Respondent,
vs.
Charles Earl Brubaker,
Defendant and Appellant.

Ellery E. Cuff, Public Defender (Los Angeles), Richard S. Buckley and Richard W. Erskine, Deputy Public Defenders, for Appellant.

Stanley Mosk, Attorney General, William E. James, Assistant Attorney General, and Robert M. Sweet, Deputy Attorney General, for Respondent.

McCOMB, J.—This is an automatic appeal from a judgment of guilty of two counts of murder after trial before a jury.

Viewing the record in the light most favorable to the People, it discloses that about midnight on Sunday, July 20, 1958, defendant strangled to death Irene

Potter Morey and her 9-year-old son, Craig Potter Morey, in Mrs. Morey's flat in Los Angeles.

Defendant presents these questions:

First. *Was the evidence sufficient to support the verdicts finding him guilty of murder in the first degree?*

Yes, for these reasons:

(a) The following rules are here applicable:

[1] 1. Where there is substantial evidence in support of a jury's verdict, it must be upheld. (*People v. Caritativo*, 46 Cal.2d 68, 72 [1] [292 P.2d 513]; *People v. Eggers*, 30 Cal.2d 676, 685 [2] [185 P.2d 1].)

[2] 2. Proof of deliberation, premeditation and willfulness may be inferred from facts and circumstances which furnish a reasonable foundation for such a conclusion. (*People v. Caritativo, supra*, at 72 [3]; *People v. Byrd*, 42 Cal.2d 200, 213 [17] [266 P.2d 505].)

[3] The record discloses that defendant freely and voluntarily, without promise of immunity or hope of reward, made the following confession to police officers after his arrest: On July 20, 1958, he had dinner with Mrs. Morey and her son in her apartment; before and after dinner he and Mrs. Morey each had a couple of drinks of vodka and orange juice; the son went to bed about 10 p.m.; and about midnight defendant "made a pass" at Mrs. Morey, and after a little petting she took off her shorts, that is, just raised up, tugged at them, and pulled them off.

Defendant was questioned, and answered as follows:

Q. Start from when you were watching television with her in the living room and the boy walks in.

A. Well, the boy was in bed and I made a pass at Irene, and she accepted the pass, so she took off her shorts. She had her blouse open all the way, and just before the actual act of intercourse was attempted, the boy walks in and sees his mother and I there.

Q. Were you both lying on the sofa at that time?

A. Yes, and she became panicky having her son see her like that. She started making a commotion and yelled that I was raping her. Well, I got excited and he said he was going to call the law, so I hit Irene in the jaw with my fist, knocked her out and I tied her hands behind her back. Then I ran after the boy. He had run into the bedroom and dragged him out and I strangled him. Then——

Q. How did you do that, Chuck?

A. I started with my hands and then wound up with the T.V. wire.

Q. Antenna?

A. Yes, or whatever it was. And then I sat there for a second or so and realized what I had done. So I knew she was still alive, and she started coming to, so I gagged her, put my handkerchief in her mouth, and took the other stocking and tied it around her throat, or her face, rather, and I choked her.

Q. You choked her with your hands?

A. With my hands.

Q. After you had the gag in her mouth?

A. After I had the gag in her mouth, yes.

Q. We didn't follow this a while ago, Chuck, but what did you do after that?

A. I got up and put my shirt on and left the house.

Q. How did you leave, by the front door?

A. The front door.

Q. And where did you go?

A. I drove around for a while and stopped at a bar and had a couple of drinks. I don't know what one, but I had a couple of drinks. Now, this comes to me now. I went to the drive-in at Western and Olympic, McDonnel's, I think it is, and while I was having something to eat, I guess that was after 2:00, this Tony, this cocktail waitress down at the Club 14, I met her there and that's—I remember now I met her. I wasn't sure whether it was Saturday or Sunday, but it was Sunday.

Q. Did you talk with her?

A. Oh, no. I just said hello to her. She was getting in her car and she looked over at me and I said "Hi" to her.

Q. Now, going back to the beginning now, Chuck, do you recall what time it was when this act of sexual intercourse was about to take place?

A. I would say it was around midnight.

Q. Around midnight?

A. Before or after midnight.

Q. Now, think it over, was it about midnight?

A. Yes, about midnight.

Q. Now, think it over very carefully, Chuck. Did you leave by the front door or the back?

A. I left by the front door and down the front steps and to my car, which was parked directly in front.

Q. Now, when you left the room, where was Irene lying?

A. On the couch.

Q. And where was the boy lying?

A. On the floor.

Q. Near the television?

A. Near it, yes.

Q. Did you rip that antenna off the window to get around this kid's neck?

A. That I don't remember.

Q. You just grabbed it? Chuck, have you been mistreated since you have been in jail?

A. No, no.

Q. Have we treated you all right?

A. I've had the best.

Q. Have you had any promise of immunity or any promises to you for telling us this story?

A. No, nothing at all.

Q. How do you feel now, physically, I mean?

A. Better than I did but I could be a hell of a lot better.

Q. You are making this statement to us because it's free and voluntary and because you want to make it?

A. That's right, yes.

Q. And because it is a true account of what happened?

A. Yes.

Q. I have one more question and nothing else to talk to him about. This story about John coming to the door——

A. That's not true.

Q. That's not true?

A. No, it's not true.

Q. Is there anything else you want to tell us about? Anything that you can recall that's important in the case that you want to tell us about?

A. No, I can't think of anything. You've got the facts there, that's all it's going to take.

Defendant further stated that he left the apartment by the front door about 12:30 a.m. and at that time he was "dead sober." Upon leaving the apartment he drove to a drive-in at Olympic and Western Avenue, Los Angeles, ordered coffee and a hamburger, and then went home.

Defendant did not take the witness stand at the trial.

Applying the foregoing rules to the evidence set forth above, it is clear that there was ample evidence to establish that the killings were the deliberate, premeditated acts of defendant and were, therefore, murders of the first degree.

[4] (b) Section 189 of the Penal Code provides that murder which is committed in the perpetration or attempt to perpetrate rape is murder of the first degree.

Applying this rule to the record in the present case, it is clear that there was substantial evidence to sus-

tain the finding of the jury that the murders in the present case were committed by defendant in his attempt to rape Mrs. Morey. The record discloses that early in the evening during defendant's visit with her, she was dressed in a blouse which had five buttons on its front and a pair of shorts with a zipper clip; that defendant admitted that he was attempting to have sexual intercourse with Mrs. Morey and was surprised by the entrance of her son into the room; that at that time she cried out that defendant was attempting to rape her; that after the murder when her body was discovered, only the top two buttons remained on the blouse and the other buttons were found scattered around the room; and that the shorts were completely torn from the lower portion of the zipper down to the crotch. In addition, the uncontradicted evidence discloses that Mrs. Morey had been bound and gagged, her body was battered and bruised, and there was considerable confusion in the room where she had been murdered. (*Cf. People v. Moore*, 48 Cal.2d 541, 547 [6] [310 P.2d 969].)

Second. ***Did the trial court err in failing to give a requested instruction on the subject of voluntary manslaughter?***

No. The jury was fully instructed on the distinction between murder of the first and second degree, but the requested instruction relative to manslaughter was refused. Defendant contends that it was error not to give his requested instruction, claiming that the evidence presented by the prosecution, and in particular the evidence of his extrajudicial statements,

was susceptible of the interpretation that his acts were committed without malice aforethought and in the heat of passion, thus putting voluntary manslaughter in issue.

[5] Voluntary manslaughter is a willful act, characterized by the presence of an intent to kill, *engendered by sufficient provocation* and by the absence of premeditation, deliberation and (by presumption of law) malice aforethought. Section 192, subdivision 1, of the Penal Code defines voluntary manslaughter as the unlawful killing of a human being, without malice, "upon a sudden quarrel or heat of passion."

[6] To be sufficient to reduce a homicide to manslaughter, the heat of passion must be such as would *naturally be aroused* in the mind of an *ordinary, reasonable person* under the given facts and circumstances, or in the mind of a person of *ordinary self-control*. (*People v. Bridgehouse*, 47 Cal.2d 406, 413 [1]-[2] [303 P.2d 1018].)

[7] The fundamental of the inquiry in determining whether a homicide is voluntary manslaughter is whether the defendant's reason was, at the time of his act, disturbed or obscured by some passion—not necessarily fear, and never the passion for revenge—to such an extent as would render *an ordinary man of average disposition* likely to act rashly or without due deliberation and reflection, and from this passion rather than from judgment. (*People v. Borchers*, 50 Cal.2d 321, 329 [6] [325 P.2d 97].)

[8] There was no evidence that would reasonably warrant the giving of the manslaughter instruction, and therefore the trial court properly refused it.

The evidence clearly indicates that defendant's reason was not obscured, but that he acted with cold calculation and deliberation. In his confession he gave meticulous details of the murders he committed and stated that when he left the apartment shortly afterward he was "dead sober."

Defendant did not take the witness stand and claim that his acts had been committed while he was under the influence of liquor or passion. On the contrary, his statements to the police described in detail his actions in killing Mrs. Morey and her son and indicated that after he left the apartment he went to a drive-in, had something to eat, and then went home.

Defendant's statements clearly negate, rather than support his interpretation of the facts as showing a killing in the heat of passion.

People v. Kelley, 208 Cal. 387 [281 P. 609], relied on by defendant, is clearly distinguishable from the present case upon it facts because, first, it was evident that the defendant had brutally killed his paramour in the course of a drinking and sexual debauch and, second, there were no extrajudicial statements from which deliberation and premeditation could be inferred.

Third. *Did the trial court err in deleting from the following instruction the portion through which lines have been drawn?:* "Evidence has been received in

this case tending to show that on ~~an occasion~~ [occasions] other than this trial the defendant himself made ~~a statement~~ [statements] tending to prove his guilt of the alleged crime for which he is on trial.

"[A statement thus made by a defendant may be either a confession or an admission.]

"A confession is a statement that was made by one who is a defendant in a criminal trial, before the trial, by which he acknowledged certain conduct of his own that constituted a crime for which he is on trial, a statement which, if true, discloses his guilt of that crime and excludes the possibility of a reasonable inference to the contrary.

"If under my instructions you find that a voluntary confession was made, you are the exclusive judges as to whether or not the confession was true; and in deciding that question you should consider all the circumstances immediately connected with the making of the statement, as shown by the evidence and all other evidence bearing reasonably upon the question.

~~"[An admission is something less than a confession in that, by itself, it is not sufficient, even if true, to warrant an inference of guilt, but which tends to prove guilt when considered with the rest of the evidence. It may consist of any statement or other conduct by a defendant whereby he expressly or impliedly acknowledges a fact that contributes in some degree to the proof of his guilt of an alleged crime for which he is on trial, and which statement was made or conduct occurred outside of that trial.~~

"[~~If you should find that a confession or an admission was false in any particular, it remains, nevertheless, evidence for your consideration, in connection with all other evidence in the case, to be given such significance and weight as your judgment may determine.~~]"

No. [9] Defendant contends that he confessed only to voluntary manslaughter and that the court, by refusing to give the manslaughter instruction and by refusing to define "admissions" as distinguished from "confessions," in effect told the jury that if they believed defendant's statements to be true he was guilty of murder, the crime with which he was charged. This contention is based upon the proposition that his extrajudicial statements may reasonably have been interpreted as indicating that the killings were rash, unfortunate acts, committed while his reasoning was obscured and he was in the heat of passion.

As pointed out above, this contention is devoid of merit. Defendant's confession, if believed by the jury, left nothing to be determined, in that it was a declaration of his intentional participation in a criminal act and was of such a nature that no inference other than the guilt of murder by defendant could be drawn from it, if the jury believed, as it did, that the confession was true. (*Cf. People v. Ferdinand*, 194 Cal. 555, 568 [11] [229 P. 341].)

The statements are in no way reasonably susceptible of the interpretation that the killings were rash, unfortunate acts committed in the heat of passion while reason was obscured. They clearly indicate that de-

fendant acted deliberately and upon a pre-existing reflection. Nothing appears in his statements, which might be considered as indicating that his actions in killing Mrs. Morey and her son were those of a reasonable man of ordinary self-control engendered by sufficient provocation.

[10] Fourth. *Did the trial court err in its instructions regarding the failure of defendant to testify?*

No. The instructions given were the standard printed forms of CALJIC (1976 rev.) 51 and 51-B. Instructions 51, 51-A and 51-B were printed on a single page, but instruction 51-A had been stricken by the process of drawing several pen or pencil lines through each word. Although instruction 51-A was thus clearly intended to be deleted, it was only partially obliterated and remained legible. The deleted instruction reads as follows: "In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence."

Defendant contends that instruction 51-A should not have been deleted and should have been given on the court's own motion, since his statements to the police indicated that he had told them all he knew and there was thus no testimony that he could have offered in further explanation. He further contends that the alleged error in this regard was compounded by the fact that the language of instruction 51-A,

though deleted, was still legible and the jury might reasonably conclude that it was deleted because the court had made a judicial finding that defendant withheld information from the police.

The trial court instructed the jury in regard to defendant's failure to testify, as follows: "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. *As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge,* if he does not testify and he fails to deny or explain *such evidence,* the jury may take that failure into consideration as tending to indicate the truth of *such evidence* and as indicating that among the inferences which reasonably may be drawn therefrom those unfavorable to the defendant are the more probable. . . ." (Italics added.)

The remainder of the instruction given emphasizes that a defendant's failure to testify does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

The instruction as given adequately and clearly informed the jury how they should view defendant's failure to testify in their consideration of the evidence in the case and is supported by the holding in *People v. Adamson,* 27 Cal.2d 478, 490 [14] et seq. [165 P.2d 3].

Relative to the fact that although instruction 51-A was clearly intended to be deleted still its language remained legible, the jury could reasonably be expected to conclude nothing more than that the instruction was not to be considered.

The supposition that the jury would read the stricken language and conclude that the court had made a judicial finding that defendant knew more than he told the police is unreasonable and contrary to the direction of instruction 51, which was read to the jury, to the effect that they might take into consideration defendant's failure to deny or explain only that evidence against him which he could "reasonably be expected to deny or explain because of facts within his knowledge."

Fifth. *Did the trial court err in receiving in evidence photographs of the bodies of the victims?*

No. Defendant urges that the court erred in receiving into evidence, over his objection, four photographs of Mrs. Morey and her son showing them in death. They were received in evidence over the objection that they were cumulative, were gruesome, added nothing to the case, and were prejudicial, and that no evidence contrary to the testimony of the autopsy surgeon would be offered by the defense. The first was a photograph of the front part of Mrs. Morey's face showing the mouth open and the tongue forced back to a point where it occluded the air passage; the second was the right side of the boy's face and neck, showing multiple bruises and abrasions; the third was the left side of the boy's face and part of his chest, showing mul-

tiple abrasions and depressions; and the fourth was the boy's face, front view, and the upper chest region, disclosing multiple abrasions.

[11] Whether the probative value of a particular photograph outweighs its possible prejudicial effect is a question to be resolved by the trial court in the exercise of its judicial discretion. (*People v. Cheary*, 48 Cal.2d 301, 312 [9] [309 P.2d 431]; *People v. Carter*, 48 Cal.2d 737, 751 [11] [312 P.2d 655].)

[12] The photographs in question were the ordinary black-and-white type showing only limited portions of the bodies of the victims, and though these photographs were not pleasant to look at, still they were not ghastly, and even though possibly cumulative, they were properly received by the trial court within the exercise of its discretion, in that they tended to clarify technical testimony of the autopsy surgeon regarding the injuries sustained by Mrs. Morey and her son.

The judgment is affirmed.

Gibson, C. J., Traynor, J., Schauer, J., Spence, J., Peters, J., and White, J., concurred.